Supreme Court, U.S.
FILED

No. 03-1189 FEB 18 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAY L. LEVY, DDS,

Petitioner,

—v.—

P & R DENTAL STRATEGIES, INC. and ANTHONY PACIELLO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

JONATHAN A. WEISS
(*Counsel of Record*)
130 West 42nd Street
New York, New York 10036
(212) 391-0120

Counsel for Petitioner

QUESTIONS PRESENTED

(1) Can two parties contract to restrict a third party's right to enter in a contract which is protected by the Article One Section 10 of the United States Constitution and Public policy incorporating this Constitutional command (obviously reflecting the United States constitutional prohibition against this "impairment of contract?").

(2) Can Summary Judgment be granted against a "third party" to a contract which restricts his ability to find work in his profession when all acknowledge the "third party" had no notice or consideration for such a restriction?

(3) Can Summary Judgment, without complete discovery, be granted against a plaintiff in a suit involving freedom of the market and his ability to contract in that market?

Parties to the Proceeding

1. Petitioner Jay Levy DDS.

2. P & R Rental Strategies Inc. and Anthony Piaciello; defendants who denied petitioner his rights under the Constitution, State Policy, and State decisional holdings.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION OF THIS COURT	1
STATEMENT OF CASE	1
PETITION FOR CERTIORARI	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
REASONS FOR GRANTING PETITION	5
CONCLUSION	5

TABLE OF AUTHORITIES

Cases: PAGE

American Inst. of Chemical Eng'rs v. Reber-Friel Co., 682 F.2d 382 2

BDO Seidman v. Hirshberg 93 N.Y.2d 382 (1999) 2, 3

Best v. Yutaka, 90 NYS 2nd 833 (1997) 2

Columbia Ribbon & Carbon Mfg. v. A-1-A. Corp., 42 N.Y.2d 496 (1977) 2, 3

Great Lakes Carbon Corp. v. Koch Ind., Inc., 497 F. Supp. 462 (S.D.N.Y. 1980) 2

Greenwich Mills v. Barrier Coffee Shop, 91 A.D.2d 398 (2d Dep't 1983) 2

Missouri v. Day-Brite Lighting, 240 S.W.2d 886 (Mo. 1951) 3

Mitchel v. Reynolds, 1 P.Wms. 181, 24 Eng. Rep. 347 2

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 3

Constitution:

U.S. Const. Art. I, Sec. 10..... 3

Other Authorities:

Employee Agreements Not to Compete, 73 Harv. L. Rev. 625 (1960)..... 2

PAGE

Freedman Cases on Contracts,
35 Geo. Wash. L. Rev. 627 (1967),
Jonathan A. Weiss 3

Petition for a Writ of Certiorari

Petitioner Jay Levy DDS respectfully petitions the judgment of the Court of Appeals of New York State.

Opinions below

The decision of the Court of Appeals decision November 20 affirmed the Appellate Division, First Department, New York Court of Appeals, New York petition for reargument, in its turn the Supreme Court (February 18, 2001) which has the only substantive written opinion.

Jurisdiction of this Court

Jurisdiction lies under Article 3 and Amendment Eleven of the United States Constitution and statutorily under 28 USC 121 NS 28 USC 1254(1). Petitioner will follow the guidance of Rule 20.

Statement of Case

Petitioner in May 1996 entered in a contract to provide dental procedures to Defendant P & G with Defendant Pacillo. Unbeknowst to him, P and G later on December 14, 1998 entered into a contract which restricted him for two years after his from contracting to provide such services to another agency after the termination of the Contract between Defendants:—when Doctor Levy's activities were deemed no long necessary by Metlife for whom Defendant P and G Defendant P & G had engaged his services. (June 1999). In June 1999 not only did P & G deny Petitioner his rights to work in his field but pursuant to the contract—made only between Defendants-petitioner was prohibited from applying anywhere (unknown to him and no waiver paid

to him) in the business. The Constitution forbids impairment of Contract as does Public policy (including in New York) See eg. *Best v. Yutaka*, 90 NYS 2nd 833 (1997) incorporating this Constitutional consideration which forbids such attempts to prevent freedom of Contract. This case represents both issues in addition to which it presents the issue of premature granting of Summary Judgment.

New York courts have long disfavored covenants that restrict the ability of individuals to procure employment, even when freely negotiated and contracted. This judicial disfavor properly reflects "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood." *See e.g., Columbia Ribbon & Carbon Mfg. v. A-1-A. Corp.*, 42 N.Y.2d 496, 499 (1977) (citing cases); *American Inst. of Chemical Eng'rs v. Reber-Friel Co.*, 682 F.2d 382, 386-87 & n.6 (2d Cir. 1982)(citing *Mitchel v. Reynolds*, 1 P.Wms. 181, 24 Eng. Rep. 347 (Q.B.1711) and Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 629 (1960), for historical discussion of how restrictive covenants have been frowned upon because of the "mischief" they cause first, in the possible loss of the covenantor's means of earning a livelihood and, second, in the loss to society of the services of a useful member); *Great Lakes Carbon Corp. v. Koch Ind., Inc.*, 497 F. Supp. 462 (S.D.N.Y. 1980); *Greenwich Mills v. Barrier Coffee Shop*, 91 A.D.2d 398, 404 (2d Dep't 1983) (decision rendering nonsolicitation covenants "virtually purposeless"). The Appellate Division ignored this line of cases, and therefore erred as a matter of law in affirming the Supreme Court's order granting summary judgment.

Most recently in *BDO Seidman v. Hirshberg*, this Court has recognized and followed *Columbia Ribbon*. *BDO Seidman v. Hirshberg* 93 N.Y.2d 382, 389 (1999)

(framing modern rule that a restrictive covenant in an employment agreement will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the former worker.)

Appellant *a fortiori* should have that principle applied to him as non-signatory to a contract that adversely affected his ability to procure employment without notice or consideration and that was, indeed, unknown to him until after its termination. Appellant was thereby denied a remedy for the loss of his reasonable expectations, in violation of the core tenet that knowledge of the terms is a necessity for contracts to be valid. *See generally,* Jonathan A. Weiss, *Freedman Cases on Contracts*, 35 Geo. Wash. L. Rev. 627 (1967) (contracts in general exist to give remedies for reasonable expectations induced by what is known and offered. This case presents a stronger reason against "restrictive covenants against contracting" (seeking to achieve by indirection what is prohibited when sought directly).

Columbia Ribbon and *BDO Seidman v. Hirshberg* discussed in Point II above reflect the important constitutional right of contract. ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, Sec. 10.) The impact of this clause is clearly behind the public policy against denying an individual the right to enter into contracts of employment. Therefore, if the State intrudes upon this right, it violates not only the individual's contractual rights but also his constitutional rights. *See generally, West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 393 (1937); *Missouri v. Day-Brite Lighting,* 240 S.W.2d 886, 894 (Mo. 1951), *aff'd.* 342 U.S. 421 (1952) (recognizing general right to enter employment contracts protected by Constitution).

Defendant P & R consults with medical providers for independent review of claims of dental services. As discovery is not complete we do not know its share of the market place. One of its clients was Metropolitan Life Insurance (whose share of the market we also do not know for the same reason.). In December 1998 P & R entered into a contract with Metropolitan life to provide dentists for evaluation of claims. Dr. Jay C, Levy was hired in 1996 before that agreement was reached and never told that an additional clause was added to his condition of employment stating he could not apply for employment in that field and in particular with Metlife. Negotiations in this regard were futile. Dr. Levy then sued on November 3, 1999 when Dr. Levy sought to regain his freedom to Contract in the field. On May December 2001, the Court changed the Motion to Dismiss and granted instead Summary Judgment. No hearing was held about the conditions surrounding the Contract or the market place for anti-trust purposes although Petitioner had pled the Sherman Act. On February 18, 2003 the Appellate Division First Department Supreme Court of New York denied an appeal and then a Motion for reargument (July 10, 2003). A Motion for Leave to appeal to the New York State Court of Appeals was denied on November 20, 2003. Petitioner seeks a Petition of Certiorari to insure a free market place and freedom of Contract.

Petition for Certiorari

Dr. Jay C. Levy respectfully petitions for a writ of certiorari to review the Judgment of the New York State of Appeals.

Constitutional and Statutory Provisions involved

This case involves the provision of Article 1, Section 10, and the First and Fourteenth Amendments to the United States Constitution. There is no statutory case law decided either in New York or in this Court, but the import of the relevant case predicates a Petition for Certiorari.

REASONS FOR GRANTING PETITION

This case will permit this Honorable Court to issue an opinion preserving the Constitutional Right to contract; the rights of third parties who do not get notice or consideration concerning covenants not to compete, and reaffirm that Summary Judgment may not be granted until Discovery is complete.

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted,

JONATHAN A. WEISS
130 West 42nd Street
New York, New York 10036

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

1-10 Mo. No. 950

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of November 2003.

Present, HON. JUDITH S. KAYE, *Chief Judge*, presiding.

JAY L. LEVY, DDS,

Appellant,

—v.—

P&R DENTAL STRATEGIES, INC, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

STUART M. COHEN

Stuart M. Cohen
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on July 10, 2003.

M-1524
Index No. 118962/99

Present Hon. Richard T. Andrias,
Justice Presiding,
Joseph P. Sullivan
Ernst H. Rosenberger
David Friedman
Luis A. Gonzalez,
Justices.

JAY L. LEVY, DDS,

Plaintiff-Appellant,

—against—

P&R DENTAL STRATEGIES, INC., et al.,

Defendants-Respondents.

Plaintiff-appellant having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on February 18, 2003 (Appeal No. 201),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

Catherine O'Hagan Wolfe
Clerk

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

JAY L. LEVY, DDS,

Plaintiff-Appellant,

—against—

P&R DENTAL STRATEGIES, INC., et. al.,

Defendants-Respondents.

Andrias, J.P., Sullivan, Rosenberger, Friedman, Gonzalez, JJ. 201

Attorneys, Chinyere Okoronkwo, Robert D. Goldstein

Order, Supreme Court, New York County (Richard Braun, J.), entered January 7, 2002, which, to the extent appealed from as limited by the brief, granted defendants' motion for summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic advantage, unanimously affirmed, with costs.

Summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic advantage was proper since there is no triable issue as to whether defendants employed wrongful means or acted solely to harm plaintiff when they sought to prevent plaintiff from obtaining employment with the Metropolitan Life Insurance Company (MetLife). Pur-

suant to the agreement between defendant P&R Dental Strategies, Inc. (P&R) and MetLife, P&R dental consultants such as plaintiff, employed by P&R to review claims filed with MetLife, were not to be hired away from P&R by MetLife until two years subsequent to the agreement's termination, a period that had not elapsed at the time plaintiff sought a consulting position with MetLife. Defendants committed no wrong, much less one sufficiently egregious to support a claim for interference with prospective economic advantage (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 300), in refusing to waive the economic protection to which P&R was purportedly contractually entitled (*see Thur v IPCO Corp.*, 173 AD2d 344, 345, *lv dismissed* 78 NY2d 1007).

While we reject the arguments raised on the appeal, it is not frivolous within the meaning of 22 NYCRR § 130-1.1 and thus affords no ground for the imposition of the sanctions, costs and fees sought by defendants.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: February 18, 2003

CATHERINE O'HAGAN WOLFE

Clerk

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JAY L. LEVY, DDS

—v.—

P&R DENTAL STRATEGIES INC.
and ANTHONY PACIELLO

DECISION AND ORDER OF THE
HON. RICHARD F. BRAUN, DATED
DECEMBER 24, 2001 APPEALED FROM WITH
NOTICE OF ENTRY, DATED JANUARY 29, 2002

PRESENT: Hon. RICHARD F. BRAUN J.S.C Part 23

INDEX NO. 118962/99

MOTION DATE October 30, 2001

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this for motion summary judgment.

Notice of Motion: Corrected Notice of Motion—Affidavits—Exhibits . . .

Answering Affidavits—Exhibits_____

Replying Affidavits_____

Papers/Numbered

1, 1a

2, 2a, 3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted to [illegible copy] of [illegible copy] Defendants summary judgment dismissing the complaint.

See Separate Opinion

Dated: New York, New York, December 24, 2001

Enter Richard F. Braun J.S.C.

Check one: ☒ Final Disposition

☐ Non-Final Disposition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

Index No. 118962/99
Filed January 7, 2002

JAY L. LEVY, DDS,

Plaintiff(s),

—against—

P&R DENTAL STRATEGIES, INC.
and ANTHONY PACIELLO,

Defendant(s).

OPINION

RICHARD F. BRAUN, J.:

This is an action for tortious interference with prospective economic advantage, tortious interference with contract, and violations of General Business Law § 340 and 15 USC § 1. Defendants moved to dismiss, pursuant to CPLR 3211(a)(1) and (7). By Decision and Order, dated May 13, 2001, this Court denied the branch pursuant to CPLR 3211(a)(1), and converted the other

branch to one for summary judgment (*see, Rich v Lefkovits*, 56 NY2d 276, 278-279 [1982]). The parties were given the opportunity to submit further papers on the summary judgment motion and did so.

Plaintiff argues that he was a third party beneficiary of the contract between Defendant P & R Dental Strategies, Inc. and Metropolitan Life Insurance Company. He was, not. Rather he was an incidental beneficiary of the contract (*see, Artwear Inc. v Hughes*, 202 AD2d 76, 81 [1st Dept 1994]).

Plaintiff's first claim must fail. He has not shown that Defendants have acted by wrongful means or with the sole purpose of causing harm to Plaintiff (*Snyder v SONY Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). The cause of action should be dismissed.

In order to recover for tortious interference with contract, one must show that there was an existing contract (*see, Israel v Wood Dolson Co., Inc.*, 1 NY2d 116, 120 [1956]). Plaintiff is not relying on any contract to which be was a party. Thus, that cause of action cannot stand, and must be dismissed.

General Business Law § 1340 declares contracts that constitute monopolies or which are in restraint of trade to be illegal and void. The instant contractual provision is a reasonable way of Defendants' protecting their interests and does not unreasonably bar Plaintiff from pursuing his profession (*see, Becker v Peress*, 111 AD2d 892 [2nd Dept 1985]; *cf., People v Roth*, 52 NY2d 440, 447 [1981] [the medical profession was held not to be criminally liable under General Business Law § 340]). Thus, that claim too should be dismissed.

General Business Law § 340 is based upon 15 USC § 1, but the latter is narrower than the former (*State of New York v. Mobil Oil Corp.*, 38 NY2d 460, 463-464

[1976]). Thus, that cause of action also falls and must be dismissed.

Therefore, none of Plaintiff's causes of action are viable. Summary judgment should be granted to Defendants dismissing the Complaint.

Dated: New York, New York
December 24, 2001

RICHARD F. BRAUN, J.S.C.

RICHARD F. BRAUN, J.S.C.